No. 18,272

United States Court of Appeals

For the Ninth Circuit

GRACE TURNER,
Appellant,

vs.

THE MANHATTAN LIFE INSURANCE COMPANY,
a New York Corporation,
Appellee.

APPELLEE
THE MANHATTAN LIFE INSURANCE COMPANY'S
ANSWERING BRIEF

JAMES F. THACHER,
THACHER, JONES, CASEY & BALL,
310 Sansome Street,
San Francisco 4, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

No. 18,272

United States Court of Appeals
For the Ninth Circuit

GRACE TURNER,
Appellant,

vs.

THE MANHATTAN LIFE INSURANCE COMPANY,
a New York Corporation,
Appellee.

APPELLEE THE MANHATTAN LIFE INSURANCE COMPANY'S ANSWERING BRIEF

Appellee does not adopt Appellant's statement of the case, believing a more complete summary is contained in the trial court's memorandum opinion in support of its judgment for the defendant insurer, The Manhattan Life Insurance Company.

STATEMENT OF THE CASE

This action arises out of an insurance policy issued by Manhattan on the life of Nobel Andre, the insured. The policy, dated February 7, 1959, became effective

March 20, 1959, when it was delivered by Manhattan to Andre and the first premium paid. (Part 1 Application, exhibit to LaPointe deposition.) At that time it was assigned to the Wells Fargo Bank, appellant's predecessor in interest, as loan collateral by Andre Paper Box Company, the policy owner and beneficiary. (Assignment of policy, exhibit to LaPointe deposition.) Less than a year later the insured died as a result of severe coronary arteriosclerosis with myocardial fibrosis. (Coroner's death certificate, Coroner's report.)

The Wells Fargo Bank claimed the face amount of the policy. An investigation was made by Manhattan. As a result, the claim was rejected and the contract of insurance rescinded. The bank refused to accept a return of the premiums paid on the policy; and suit was brought by its assignee, Grace Turner, for the policy's face amount. (Correspondence, exhibit to LaPointe deposition.)

The insurer rescinded its policy and disclaimed death benefit liability on the ground that Part 2 of the insured's application, dated January 20, 1959, forming part of the policy, contained material misrepresentations going to the very heart of the medical risk it was asked to insure against. Specifically, the insurer contended the negative answers to the following questions contained in the insured's medical history (Part 2 of the Application) were untrue, were known by the insured to be untrue, and were material to the risk the insured by his application asked the insurer to assume. (Answer of The Manhattan Life Insurance Company, C.T. p. 88, lines 22-25.)

Q. [19] Have you ever been an inmate of, or received treatment or cure at an . . . hospital . . .?
A. No.

Untrue answers were also given to each of these questions:

[16] Have you ever suffered from any ailment or disease of: (a) The Brain . . .? (b) . . . Blood Vessels . . .?

The trial court found Manhattan's contentions to be correct and the insured's answers to have been untrue.

In particular, Judge Zirpoli found that on October 22, 1958, three months before the insured applied for insurance, he had been hospitalized for three days in the Hahnemann Hospital, San Francisco, as a result of a cerebral vascular accident (Finding 6, C.T. 60), and that less than a year before that, in December 1957, he had experienced a ten-day episode of chest pains which his doctor advised him constituted *angina pectoris* and resulted from coronary insufficiency. (Finding 7, C.T. 60.) Neither finding is challenged.

The trial court further specifically found the answers to the questions were false, were known by Andre at the time given to be false (Finding 5, C.T. 60), were not the result of inadvertence or misunderstanding of the questions asked (Finding 8, C.T. 60), were material misrepresentations to the insurer of the state of the insured's physical condition (Findings 9 and 10) and were relied on by the insurer in issuing

its policy. As a result, the court concluded the insurer had a right to and did rescind its policy on Andre's life.

SUMMARY OF ARGUMENT

I

There is substantial evidence in the record that Andre's answers to Questions 19, 16(a) and 16(b) in his application to the Manhattan Life Insurance Company were untrue when he gave them, were untrue when the policy issued on such application took effect, and were known by him at both times to be untrue.

II

There is substantial evidence in the the record to support the trial court's finding that the insured's answers to Questions 19, 16(a) and 16(b) were made in bad faith.

III

There is substantial evidence in the record Manhattan relied on the representations Andre made about his health.

IV

The action taken by Pacific Mutual is irrelevant.

V

There is nothing in the record requiring Manhattan to have disbelieved Andre.

VI

Dr. Robbins' opinion that Manhattan properly relied on Andre's representations is soundly based on evidence in the record.

VII

The medical histories given by Andre to Dr. Holliger, the Hahnemann Hospital and the Presbyterian Hospital for the purpose and at the time of treatment are admissible in evidence.

VIII

Dr. LaPointe's testimony Manhattan would not have accepted the medical risk presented by Andre had it known the truth is admissible in evidence.

IX

Wills v. Policy Holders Life Ins. Ass'n, 12 C.A. 2d 659 is readily distinguishable.

X

As a matter of law Manhattan was entitled to rescind its policy.

ARGUMENT

I

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT ANDRE'S ANSWERS TO QUESTIONS 19, 16(a) and 16(b) IN HIS APPLICATION TO THE MANHATTAN LIFE INSURANCE COMPANY WERE UNTRUE WHEN HE GAVE THEM, WERE UNTRUE WHEN THE POLICY ISSUED ON SUCH APPLICATION TOOK EFFECT, AND WERE KNOWN BY HIM AT BOTH TIMES TO BE UNTRUE.

The representations in issue, made in the form of negative answers to the questions asked in the insured's application to Manhattan for insurance, were made on January 20, 1959, and continued until March 20, 1959, when the policy, of which the application formed a part, took effect. (Part 2 application, Questions 16(a) and (b), 19, exhibit to deposition of L. Gordon LaPointe, M.D.) *Insurance Code* § 356; *Security Life Ins. Co. v. Booms,* 31 Cal. App. 119; *General Accident, F. & L. A. Corp. v. Industrial Accident Comm'n,* 196 Cal. 179. What was represented, however, was not true. For on October 22, 1958, three months before he signed the application, Andre had been hospitalized for three days at the Hahnemann Hospital in San Francisco as the result of a stroke. (Hahnemann Hospital Admission Records, exhibit to deposition of Mary Moran.)

The hospital records show he gave a history at the time of admission of being stricken with dizziness, difficulty in talking and expressing his thoughts, and with numbness in his right hand. (Admission Records, Hahnemann Hospital pp. 1-2.) He gave the same history to his doctor (Holliger) who, making a contem-

poraneous entry in his own journal on October 22, diagnosed the occurrence as a cerebral vascular accident or, in layman's language, a "stroke". (Holliger deposition, p. 30, line 23; Journal p. 21, deposition of Dr. Victor H. Holliger.) No other diagnosis was given nor was the patient treated for anything else while at the hospital. (Admission Records, Hahnemann Hospital.)

It is known the effects of the stroke lasted at least eight days, for in Dr. Holliger's journal under the date October 31, 1958, the following entry appears: "Effects from C.V.A. are daily improving, able to focus better and read now." (Journal p. 22.) Evidently, Andre still had some trouble focusing his eyes at the time. (Holliger Dep. p. 35, line 10.)

According to Dr. Holliger the cerebral vascular accident was the result of a thrombosis or rupture of a blood vessel in the brain. (Holliger Dep. p. 30, line 25 to p. 31, line 5.) He was certain he told Andre about it, who, to the best of the doctor's ability, was kept advised of the condition of his health. (Holliger Dep. p. 34, lines 6-15.)

Evidently Andre remembered what he had been told. Five months later on March 26, 1959, six days after Manhattan's insurance policy took effect, Andre was admitted to the Presbyterian Hospital in New York City. At the time he gave a history of having experienced four months previously a transient right hemiparesis accompanied by an inability to speak which had been diagnosed as a stroke and for which he had

been hospitalized. (Presbyterian Hospital Records, pp. 7-8, exhibit to deposition of Francis K. Tuxbury.)

Faced with the obvious impact of this record on the issue of knowing misrepresentation, appellant attempts to excuse away the false answers regarding the insured's hospitalization by arguing, first, the question asked in the application was so ambiguous as not to have been asked and, second, the hospitalization was a minor matter which Andre forgot about.

Words may be slippery things but the disjunctive question, "Have you ever been an inmate of, or received treatment or cure at an asylum, hospital or sanitarium?" is about as plain as language admits. Nor can the obvious false answer to the question asked be brushed off as a casual inadvertence. The insured was clever enough to realize notice of hospitalization would probably lead to an examination of the hospital record with its tell-tale diagnosis of "C.V.A." and to no insurance at *any* rate. After all, Andre was aware that even without any record of hospitalization or stroke he had been turned down by Canada Life and rated by Pacific Mutual.

Appellant next suggests the insured forgot about the stroke, as he might, perhaps, a common cold. But Dr. Holliger's record made at the time of the events does not bear this out.

The doctor in his journal entry of October 22, 1958, states: "Sudden onset, speech difficulty and incoordination today. Small C.V.A. Sent to hospital." On October 28: "Discharged from hospital . . . doing o.k.

now. No lack of coordination, speech difficulty. Reflex o.k." Again from his journal, on October 31, 1958, eight days after the onset of the stroke the doctor states: "Effects from C.V.A. are daily improving, able to focus better and read now." When asked about this entry on deposition the doctor admitted that eight days after the stroke the patient still had difficulty focusing [his eyes]. (Holliger Dep., pp. 33-34.)

Andre knew about his condition. Anyone, but a fool, hospitalized under the circumstances he was and who two days later still had difficulty putting his thoughts in words and eight days later focusing his eyes would. (Presbyterian Hospital Records p. 7.) So much for the cerebral circulatory system.

To turn now to the coronary circulatory system. There is substantial evidence in the record Andre knowingly misrepresented the condition of this system too. The chest pains suffered by Andre in December 1957 but denied in his application, were diagnosed at the time by Dr. Holliger as involving Andre's coronary circulatory system.

The written record speaks for itself. On December 26, 1957, according to Dr. Holliger's journal entry made at the time (Journal p. 20, Holliger Dep. p. 24), Andre gave him a detailed history of chest pains which had begun ten days earlier after he had been to a football game. A physical examination was given, an elevated sedimentation rate noted and an EKG taken the following day. (Exhibit p. 2, Holliger Dep.) Three days later, December 30, 1957,

Andre came into Holliger's office for a "talk" (Holliger Dep. p. 25, line 17; Journal p. 21) at which time he was told Holliger's diagnosis: "Angina and coronary insufficiency". (Holliger Dep. p. 26, line 15.) Moreover, Holliger went over the diagnosis with Andre in detail telling him the chest pains were heart pains and that he had coronary insufficiency. (Holliger Dep. p. 26, line 13 to p. 28, line 18.) To the date of his deposition (August 11, 1961) Dr. Holliger had no reason to believe his diagnosis of *angina pectoris* and coronary insufficiency made at the time was incorrect. (Holliger Dep. p. 29, line 9 to line 17).

These pains apparently continued to reoccur during 1958. (Presbyterian Hospital Records, p. 7.)

II

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT THE INSURED'S ANSWERS TO QUESTIONS 19, 16(a) and 16(b) WERE MADE IN BAD FAITH.

The trial court found the answers to Questions 19, 16(a) and 16(b) of the application were false, were known by Andre to be false, did not result from misunderstanding or inadvertence, and constituted material misrepresentations of the insured's physical condition.

Appellant does not challenge the findings that the insured answered the questions negatively (Finding 4), that the facts were otherwise than represented by the insured (Findings 6 and 7), and that the false an-

swers given constituted a material misrepresentation to Manhattan of the insured's physical condition. (Findings 9 and 10.) Surely no other reasonable inference could be drawn by the trial court from this record than that Andre knowingly made such answers in bad faith. (C.T. p. 53, lines 3-20.)

III

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD MANHATTAN RELIED ON THE REPRESENTATIONS ANDRE MADE ABOUT HIS HEALTH.

Dr. LaPointe, Manhattan's medical director, was the person charged with making the final decision whether or not insurance would issue. (LaPointe Dep. pp. 4-5.) He testified on deposition that had he known of the information contained in the Hahnemann Hospital records Manhattan would not have insured Andre's life. (LaPointe Dep. pp. 13-14, line 3.)

Obviously knowledge of this episode involving the cerebral circulatory system was medically important and Andre's misrepresentation concealing it material. *Insurance Code* §§360 and 334. *Cohen v. Penn Mutual Life Ins. Co.,* 48 C.2d 720 (1957); *National Life & Accident Ins. Co. v. Gorey,* 249 F.2d 388 (9th Cir. 1957). Its medical materiality was confirmed by appellee's expert, Dr. Robbins. (R.T. p. 88, line 22 to p. 89, line 24.) It could only have negatively affected Manhattan's evaluation of the medical risk. (LaPointe Dep. p. 12, line 1 to p. 14, line 3.)

Moreover, Manhattan had no information indicating Andre had angina or chest pains. (LaPointe Dep. p. 8, line 22 to p. 9, line 5.)

On March 20, 1958, in connection with a preliminary inquiry to Manhattan for insurance Andre authorized Holliger, his personal physician since 1949, to supply Manhattan ". . . with any and all information you have regarding my medical history and physical condition, up to and including *this* date." (Photocopy attached to Holliger's copy of his March 31, 1958, letter to Manhattan, exhibit Dr. Holliger's deposition.) Pursuant to this authorization LaPointe wrote Holliger March 25, 1958, requesting information "re care rendered", to which Holliger replied on March 31, 1958, "The above named person was under observation by me from 11/27/50 to 12/26/57." Note that the period of observation was *to* but not *through* December 26, 1957, the day Andre reported the chest pains Holliger diagnosed as angina. Nothing was said to Manhattan about this.

LaPointe next wrote Dr. Holliger on January 29, 1959, asking him to "comment re check-ups including any data *since* your report to us of March 25, 1958". To this Holliger replied on February 16, 1959: "I have very little to add to the information that you already have regarding Mr. Andre." A ten-day attack of chest pains diagnosed as angina and coronary insufficiency and a subsequent stroke apparently constituted *very little,* at least for insurance purposes.

The chest pains were important. The three doctors, LaPointe, Robbins, and Holliger each testified to the

significance of Andre's chest pains in evaluating the medical risk presented by him. This bit of medical history was the key to the correct interpretation of the electrocardiograms submitted to Manhattan. (LaPointe Dep. p. 9, line 14 to p. 11, line 3; Dr. Robbins' interrogation by the trial court, R.T. 93, line 9 to p. 94, line 5; R.T. 84, line 20 to p. 86, line 21.) Appellant's witness, Dr. Holliger, stated, "It is our policy that you combine your laboratory, your history, your physical findings; all three have to go together." (Holliger Dep. p. 52, lines 13-15.)

The question before the insurer was not whether Andre had a heart condition. As Dr. LaPointe quite freely admits, he knew he had. The question before the insurer was whether, despite the heart condition it knew about, Andre was still an insurable but rated risk.

In the spring of 1958 on the basis of the 1956 history given in an application to Pacific Mutual and the December 1957 EKG, the only EKG sent Manhattan at the time by Dr. Holliger, Manhattan felt he wasn't.

In January 1959 the question of insurance was in effect again raised by Andre and a new application (medical history) and a current EKG sent Manhattan. On the basis of the current application and a supporting EKG, both of which indicated an asymptomatic condition (R.T. 85, line 11 through 86, line 21), LaPointe judged Andre a rated but insurable risk. LaPointe Dep. pp. 14, 15.)

In short, Manhattan's medical examiner said he relied on the insured's negative answers to the questions in evaluating the medical risk presented by the insured. The trial court was entitled to believe he did, particularly when the two other doctors testifying said it was sound to do so.

This section of appellee's argument, can best be concluded by the forceful illustration of interpolating the record at bar within the language of this court in *National Life and Accident Insurance Co. v. Gorey,* supra, p. 395: "The misstatement[s], according to the only evidence on the subject, [were] relied upon by the defendant, and did materially affect the defendant's willingness to accept the risk. The defendant asked for specific answers to [three] certain questions; the answers given were not true, and defendant was denied the right to determine for itself the matter of the deceased's insurability, and the underwriting risks it was willing to undertake."

IV

THE ACTION TAKEN BY PACIFIC MUTUAL IS IRRELEVANT.

What Pacific Mutual may or may not have done about insuring Andre is irrelevant. It is true Manhattan knew Andre had applied to Pacific Mutual for additional coverage in 1959. It is also true appellant's witness, Crooks, a local insurance broker with offices with Pacific Mutual, testified he told Manhattan's San Francisco representative that Pacific Mutual had de-

clined such additional coverage. But Crooks didn't say *when* he told Manhattan's local agent and Dr. Murray, Manhattan's assistant medical director stated, in answer to appellant's interrogatories, that to the best of his knowledge and belief Manhattan had no knowledge prior to the insured's death that Pacific Mutual declined coverage. (C.T. pp. 27, 30.)

But what is the relevance of what Pacific Mutual did? There is no evidence of what Pacific Mutual knew about Andre or why it declined. It already had a $25,000 rated policy on Andre as it was. Most probably it decided that $25,000 in a rated class was enough. That was all Manhattan would take.

V

THERE IS NOTHING IN THE RECORD REQUIRING MANHATTAN TO HAVE DISBELIEVED ANDRE.

Despite appellant's suggestions, there is nothing in the record requiring Manhattan to have adopted the hypothesis the insured was a liar. In addition to the application comprising a medical history, examination and heart chart, defendant had a current EKG, a chest x-ray, a copy of a 1957 EKG, the records of the MIB, and all other documents attached to Dr. LaPointe's deposition, including Dr. Holliger's letter conveniently omitting any reference to the 1957 angina and the 1958 hospitalization and stroke. This information all pointed towards an arrested, stabilized asymptomatic heart condition, that is, to an insurable but rated risk.

Weir v. New York Life Ins. Co., 91 Cal. App. 222, has no applicability. There the insurer knew the insured was lying about the very representation in issue. And neither has *Di Pasqua v. California etc. Life Insurance Company,* 106 C.A.2d 281. There the information regarding hospitalization, about which a misrepresentation was made in the application, was in the insurer's file. No comparable information was in Manhattan's files at any time. Finally, a waiver as to lack of knowledge as to the chest pains, if one were found, is not a waiver as to the misrepresentation regarding hospitalization. *S. F. Lathing Co. v. Penn Mutual L. Ins. Co.,* 144 C.A.2d 181.

VI

DR. ROBBINS' OPINION THAT MANHATTAN PROPERLY RELIED ON ANDRE'S REPRESENTATIONS IS SOUNDLY BASED ON EVIDENCE IN THE RECORD.

Appellant states that Dr. Robbins' opinion is invalid because ". . . it is predicated upon a false hypothesis" in that ". . . there is absolutely no evidence of any recurring [chest] pains during 1958." Appellant is mistaken. Andre in his medical history given the Presbyterian Hospital on March 26, 1959, told the admitting physician that for the past year he experienced bilateral dull chest pains unrelated to exercise and usually occurring in late afternoon and subsiding in fifteen minutes with rest. (Presbyterian Hospital Records, p. 7.)

VII

THE MEDICAL HISTORIES GIVEN BY ANDRE TO DR. HOLLINGER, THE HAHNEMANN HOSPITAL AND THE PRESBYTERIAN HOSPITAL FOR THE PURPOSE AND AT THE TIME OF TREATMENT ARE ADMISSIBLE IN EVIDENCE.

Appellant urges the medical history given by Andre at the various times he sought medical treatment is inadmissible hearsay.

This objection, touching as it does a fundamental doctrine of the law of evidence, reflects a misconception of what the issues of this case are about. The history given by Andre at the time of his admission to the Hahnemann and Presbyterian hospitals, including the diagnosis (offered but excluded by the trial court), was offered not primarily to prove the truth of the matter asserted. Manhattan had no interest in challenging the diagnosis or contesting the truth of the histories given the various hospitals and doctors. The statements and excluded diagnosis were offered as *the* operative facts, verbal acts so to speak: to show *what* the records stated, not the *truth* of what they stated. As such they are not hearsay.

Even so, appellee need not limit its offer of proof to the statements as operative facts. The hospital records are admissible under 28 USC 1732 as records kept in the ordinary course of business and the history they contain, given by Andre to secure treatment, is admissible to prove the truth of the matter asserted under a recognized exception to the hearsay rule.

The Federal rule is stated in *Lutz v. New England M. L. Ins. Co.,* 161 F.2d 833 (9th Cir. 1946); *Meaney*

v. United States, 112 F.2d 538 (2d Cir. 1940) (L. Hand, J.); *Stewart v. Baltimore & O.R. Co.,* 137 F.2d 527 (2d Cir. 1943) (A. N. Hand, J.); and *Medina v. Erickson,* 226 F.2d 475 (9th Cir. 1955), expressly disavowing *New York Life Ins. Co. v. Taylor,* 147 F.2d 297 (D. C. Cir. 1945).

These cases sensibly point out that when medical history is given to the treating physician by the patient at the time of treatment for the purpose of treatment, a sufficient safeguard of veracity exists to permit an exception to the hearsay rule.

VIII

DR. LA POINTE'S TESTIMONY MANHATTAN WOULD NOT HAVE ASSUMED THE MEDICAL RISK PRESENTED BY ANDRE HAD IT KNOWN THE TRUTH IS ADMISSIBLE IN EVIDENCE.

Manhattan introduced the entire deposition of Dr. LaPointe and certain of the attached exhibits. Appellant introduced the balance so all the exhibits are in evidence. Lines 6 through 12 on page 9 of the deposition were objected to and stricken from the record by agreement. Admission of the testimony beginning on line 13 of page 9 through line 4 on page 11 and beginning on line 5 of page 12 through line 3 of page 14 and beginning on line 21 of page 14 through line 3 of page 15 is objected to on the grounds it constitutes a self-serving statement by the insurer that the application would not have been accepted had the truth of the matter misrepresented been known.

The exclusionary rule urged by appellant is outmoded. The modern trend of authority is that while the trier is the sole judge of the critical issue to be decided, it is no objection to expert testimony that it is given on the critical issue. *Eastern Trans. Line v. Hope,* 95 U.S. 297, 298, 24 L.Ed. 477, 478; *Millers' Nat. Ins. Co. v. Wichita Flour M. Co.,* 257 F.2d 93 (10th Cir. 1958); *Wells Truckways, Ltd. v. Cebrian,* 122 C.A.2d 666 (1954); *People v. Cole,* 47 C.2d 99 (1956). As recently as February 1, 1963, the California court in *People v. Peoples,* 212 ACA 603, 605, said: "Although there is a conflict between the various jurisdictions of this country on the question (see 66 A.L.R 2d 1048), this state is committed to the rule which, in a proper case, permits testimony expressing an opinion on the ultimate fact."

The case at bar is just such a proper case. The statutory definition of materiality requires inquiry into the ". . . reasonable influence of the facts upon the *party* to whom the communication is due, in forming *his* estimate of the disadvantages of the proposed contract, or in making his inquiries", Insurance Code § 334. (Italics added.) A more subjective test is hard to imagine.

IX

WILLS v. POLICY HOLDERS LIFE INS. ASSN., 12 C.A.2d 659 IS READILY DISTINGUISHABLE.

Wills involved a suit on a life insurance policy by the beneficiary of the insured who had died from "sclerosis with occlusion of the left coronary artery of the heart." On her application the insured had stated ". . . I am in good health and so far as I know have no disease . . ." An autopsy disclosed that apparently at the time she made the statement she was suffering from heart disease; however, ". . . there was not a syllable of evidence to indicate that the insured possessed knowledge of that fact." The appellate court reversed the trial court and held the insurer had no right to void the policy since there had been no showing the insured knew the statements regarding her health were false or had reasonable cause to believe they were false.

Obviously such is not the situation here.

X

AS A MATTER OF LAW MANHATTAN WAS ENTITLED TO RESCIND ITS POLICY.

When false representations as to material matters have been made, the existence of a fraudulent intent to deceive is not essential. *Telford v. New York Life Ins. Co.*, 9 C.2d 103, 105. The representations in the form of answers to specific questions asked Andre about his medical history were material as a matter

of law and, since false, vitiated the contract. *Cohen v. Penn Mutual Life Ins. Co.,* 48 C.2d 720; *National Life and Accident Insurance Co. v. Gorey,* 249 F.2d 388, 393, and cases cited.

CONCLUSION

There is more than substantial evidence in the record that the representations in issue, contained in the application and forming a part of the policy, were false, were material in fact, are deemed material by law, and were relied on by Manhattan in issuing its policy. Appellee, therefore, can end only where it began: As a matter of law Manhattan was entitled to have a true picture of the insured's apparent medical condition at the time it was asked to assume the risk of underwriting his life expectancy. *Cohen v. Penn Mutual Life Ins. Co.,* supra; *National Life and Accident Ins. Co. v. Gorey,* supra. The evidence shows such a picture was not given. Significant material facts pertaining to appellant's medical history and bearing on the state of his health were withheld. For this reason the trial court's judgment that appellee could and did rescind its contract of insurance should be affirmed.

Dated, San Francisco, California,
April 15, 1963.

JAMES F. THACHER,
THACHER, JONES, CASEY & BALL,
Attorneys for Appellee.

Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James F. Thacher,
Attorney for Appellee.